

Australian Union of Students

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Renata Hesse
Trial Attorney
601 D Street, NW, Suite 1200
Washington, D.C. 20530

Dear Sir/Madam,

I refer to the case against Microsoft Corporation in the United States District Court for the District of Columbia, reference Civil Action No. 98-1232 and No. 98-1233. In accordance with the Antitrust Procedures and Penalties Act, the United States Government is required to consider submissions from members of the public about its proposed settlement with Microsoft Corporation. Please take into consideration the accompanying submission of our association, which we are making on behalf of our members who are United States citizens.

Cordially,



Geoff Bird
National President

SUBMISSION IN RESPONSE TO
THE PROPOSED SETTLEMENT
OF THE ANTITRUST CASE
AGAINST MICROSOFT CORPORATION

AUSTRALIAN UNION OF STUDENTS

NOVEMBER 2001

EXECUTIVE SUMMARY

1. The proposed settlement will not end litigation against Microsoft, as it neglects to punish Microsoft for unlawful conduct and compensate those affected.
2. If the proposed settlement goes ahead, it will deprive the United States Government of influence over the settlement that Microsoft will ultimately reach with the European Union.
3. Accordingly, our association, on behalf of our members who are American citizens, wishes to propose an alternative settlement.
4. Microsoft should be required to publish the source code for its operating systems.
5. Microsoft should be required, by way of a punishment, to set up a venture capital corporation, and to transfer a proportion of its assets to this corporation.
6. The assets which Microsoft should be required to transfer should be equal to the stockholders' equity in Microsoft, less the stockholders' equity that Microsoft would have if it had complied with the law.
7. The venture capital company should be required to invest in business start-ups in a country in proportion to the amount that residents of the country have spent on Microsoft products.
8. Stockholders in Microsoft should be issued with stock in the venture capital company in proportion to their holding in Microsoft.
9. The United States Government should be required to use its best efforts to persuade foreign governments to enact legislation excusing Microsoft for any illegal action committed prior to 2002.
10. If a government of a foreign country does not enact the legislation, the venture capital corporation should not be required to invest in the country.

SUBMISSION

The United States Government has brought an anti-trust action against Microsoft Corporation. Following the election of President Bush with the assistance of donations from Microsoft, the Justice Department has reached a settlement with Microsoft. According to the Antitrust Procedures and Penalties Act, the details of the settlement have to be published in the "Federal Register". Members of the public have sixty days to make written submissions on the proposed settlement. This submission is being made in accordance with the statute.

Our association, the Australian Union of Students, has standing to make a submission on the following basis. We have a number of United States citizens as members. Under the constitution of our association, we have the power to make representations to governments on behalf of our members, without necessarily consulting the members beforehand. Accordingly, this submission should be treated as though it was made by American citizens. We could, if necessary, provide to the United States Government, in confidence, the names and addresses of the members concerned.

We are against the proposed settlement. It is not that we are unsympathetic to Microsoft. The management of Microsoft are very much respected in Australia, and are held out by our association as examples who young people in Australia should copy. Nevertheless, the proposed settlement will be of limited usefulness to Microsoft, and will not settle existing litigation by American states, and proposed litigation by European Union countries. This litigation will go ahead, and there will in time be settlements or judgments, which may not be beneficial to Microsoft or the United States.

From the point of view of the United States Government, Microsoft has been held to have broken the law, and to have gained substantial financial benefits as a result. The Justice Department is of the view that it would be undesirable to break up Microsoft into smaller corporations, or to require that Microsoft pay fines. We agree with this. At the same time, Microsoft should have to make up for its illegal actions in some way, so as to discourage other corporations from breaking the law.

The advantage of an out-of-court settlement is that Microsoft can be made to do things that it otherwise cannot be made to do. A court is limited in what it can order. But an out-of-court settlement can contain anything within reason. As an example, an out-of-court settlement could contain a requirement that Microsoft executives must wash their hair each day. An out-of-court settlement should be a "wish list" of things that Microsoft should do. The Justice Department has not been imaginative enough in formulating its "wish list".

The Justice Department's "wish list" must meet two requirements. First, it must end the illegal conduct by Microsoft. Secondly, it must compensate the people adversely affected by Microsoft's actions. The Justice Department should be asking the question, "What can Microsoft do that would be most beneficial to users of its operating systems?" This should not necessarily be limited to things that Microsoft can do in its capacity as a supplier of operating systems, but should include anything that Microsoft can do.

For example, an out-of-court settlement could include Microsoft making donations to charities. No distinction should be made between a donation made by Microsoft and a donation made by its stockholders. Past charitable donations certainly go some way to making up for Microsoft's actions, and should be taken into account in deciding whether to accept an out-of-court settlement.

To end the illegal conduct by Microsoft, we propose that Microsoft should publish the source code written by its programmers, that is used to compile its operating systems, from DOS up to and including Windows XP. This should include comments by programmers put in to explain what the code does. But it should not include code for functions that are for national security purposes.

The publication of the source code would not make piracy of Microsoft operating systems any easier. The software can already be copied illegally. Anyone compiling the operating system from the source code, and using the software without paying a royalty could still be prosecuted.

The advantage of publishing the source code would be that software developers could produce operating systems that are functionally equivalent to Microsoft operating systems. If Microsoft refused to allow its distributors to bundle software with its Windows operating systems, Microsoft would run the risk that a distributor would use an equivalent operating system from some other software developer.

Microsoft operating systems have a similar status to human DNA. The information is essential for everyday life. It is surely unsatisfactory that information that is essential for everyday life should be controlled by Microsoft. Certainly Microsoft developed the information, at great expense, so is entitled to a royalty. But they should not be able to prevent further development and improvement of the information.

In formulating its out-of-court settlement, the Justice Department appears to have thought that Microsoft can best compensate consumers for its illegal actions by continuing to develop operating systems. We disagree. We think Microsoft's talent can be used to greater effect in the field of Venture Capital. Of course, if Microsoft was complying with the law, it would be up to them how they use their resources. But since they have broken the law, it is up to the government. The terms of an out-of-court settlement are up to the government.

We propose that Microsoft should be required by a settlement to set up a venture capital corporation. This corporation would invest in and provide advice to business start-ups. Microsoft would be required to transfer a large part of its assets to this corporation. Its stockholders would be issued with stock in the new corporation, in proportion to their holding in Microsoft. The corporation would be required by its charter to invest an amount in each country that is proportional to the amount that has been spent in that country on Microsoft products. This would be advantageous to the European Union, and so they would be likely to agree to such a settlement.

To make sure they do, the United States Government should lobby the European Union and other countries on Microsoft's behalf for legislation to excuse Microsoft from any illegal action committed prior to 2002. It should be included in the out-of-court settlement that the government must use its best efforts to secure such legislation. Such legislation should be a pre-requisite for the venture capital corporation being required to spend any money in a country.

The amount that Microsoft should have to invest in the venture capital corporation would be set so as to compel Microsoft to downsize to the size they would have reached if they had complied with the anti-trust statute. In other words, their stockholders' equity should be reduced to a level that it would be if they had complied with the statute. Microsoft will as a result have to scale down the extent of its activities and lay off staff. These people will be able to set up businesses in areas of Information Technology that Microsoft was previously involved in. Hence there will be greater competition.

We are suggesting that the Justice Department try to compel Microsoft to transfer its capital into the Venture Capital Industry. This is based on a number of considerations. Microsoft has expertise in taking an industry which is disorganised, and organising it. The Information Technology Industry was disorganised in 1975, but after Microsoft released its Windows 98 operating system, it became organised on a comparable basis with other industries. In our view, it is a waste of resources for Microsoft to continue being exclusively involved in this area. Cars made in 2001 are not much better than cars made in 1971, and Windows XP is not much better than Windows 98.

There are a number of industries which are disorganised compared to other industries. The Venture Capital Industry is disorganised in most countries, and is organised only on the West Coast of the United States. Other industries that are particularly disorganised are the Entertainment Industry, the Property Development Industry, and the Genetic Engineering Industry. By getting involved in Venture Capital, Microsoft can bring its organisational ability to bear on helping set up businesses in Information Technology, Entertainment, Property Development, and Genetic Engineering. This will be of incalculable benefit to consumers. Microsoft already acts as a venture capital corporation, so it has staff who can be transferred to the proposed corporation.

The Justice Department's proposed solution certainly prevents future breaches of the anti-trust statute by Microsoft. But it is not as imaginative and beneficial as our proposed solution. Of course, the staff of the Department of Justice work under great pressure, in circumstances that are not conducive to imagination. That is why the United States Congress made provision for the Department of Justice to consider public submissions, in order to arrive at a more imaginative solution. We hope our submission is of some assistance.

Our telephone number including country code is +61 7 3321 3059, and our facsimile number is +61 7 3311 2090, while our e-mail address is info@students.org.au, and our postal address is Australian Union of Students, P.O. Box 123, Roma Street, Brisbane 4003, Queensland, Australia.
